

STATUS: Final

POLICY NUMBER: 08-003-NPD

SUBJECT: Supplemental Environmental Project Policy

AUTHORIZED: Thomas W. Easterly, Commissioner

SUPERSEDES: Enforcement-99-003-NPD

ISSUING OFFICE(S): Office of Enforcement

ORIGINALLY EFFECTIVE: April 5, 1999

RENEWED/REVISED: Date: June 20, 2008

Disclaimer: This Nonrule Policy Document (NPD) is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty (30) days after presentation to the appropriate State Environmental Board. Pursuant to [IC 13-14-1-11.5](#), this policy will be available for public inspection for at least forty-five (45) days prior to presentation to the appropriate board. If the nonrule policy is presented to more than one State Environmental Board, it will be effective thirty (30) days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the State Environmental Board and publication.

A May 2007 IRS directive, affirming a year-old IRS Technical Advice Memorandum, clarified the deductibility of SEP costs for taxpaying violators. IRS Industry Director Directive on Govt. Settlements Directive #1, LMSB-04-0507-042 (May 30, 2007) (IRS directive); IRS Tech. Adv. Mem. 2006-29030 (Mar. 31, 2006) (IRS decision).

1.0 PURPOSE

The Supplemental Environmental Projects (SEP) Policy (Policy) outlines the Indiana Department of Environmental Management's (IDEM) exercise of its enforcement discretion regarding how a Regulated Entity issued a Notice of Violation, or other similar Civil Penalty- bearing enforcement action, under the IDEM Civil Penalty Policy, may offset the amount of the Gravity-Based Civil Penalty by undertaking a supplemental environmentally-beneficial project.

2.0 SCOPE

This Policy applies to SEPs proposed by Regulated Entities. This Policy sets forth factors to be considered when determining whether IDEM will accept a SEP as part of the settlement of an enforcement action.

The decision on the part of the State to settle an enforcement action is that of IDEM. Acceptance of a SEP as part of settling an enforcement action is solely within IDEM's discretion.

This Policy should be used whenever applicable in settlement negotiations for administrative enforcement actions. It is not intended for use in pleading, at hearing, or at trial. This Policy is not a final agency action and is intended only as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

To the extent that other existing IDEM enforcement policies are not inconsistent, they will continue to apply in conjunction with this Policy.

3.0 SUMMARY

This Policy sets forth: (1) criteria used to determine suitable SEPs; (2) categories of SEPs; (3) extent by which the Civil Penalty can be mitigated by a SEP; and (4) information to include in a SEP proposal.

4.0 DEFINITIONS

4.1 Agreed Order (AO) - The enforceable, legal document by and between IDEM and a Respondent that requires Respondent to pay penalties and perform corrective measures in order for Respondent to return to compliance.

4.2 Case Manager - Staff within the Office of Enforcement responsible for the receipt, review, and management of informal and formal Agency enforcement actions.

4.3 Economic Benefit of Non-Compliance - An economic or monetary gain. It may be the economic gain accrued to Respondent due to noncompliance or it may be the economic gain accrued to Respondent due to the implementation of a SEP. Economic benefit from noncompliance may be accrued by delaying necessary pollution control expenditures, avoiding necessary pollution control expenditures, and/or by gaining an illegal competitive advantage during the period of noncompliance (via selling banned products or capturing extra market shares through selling products at a lower cost than complying competitors). Economic benefit from a SEP may include tax relief accrued, reduced material costs, and/or reduced disposal costs accrued to Respondent due to implementation of the SEP.

4.4 Environmental Audit - A voluntary, internal, and comprehensive evaluation of either a (1) Facility or an activity at a Facility subject to Indiana's Environmental Requirements; or (2) management systems related to a Facility or an activity, each designed to identify and prevent noncompliance with laws and improve compliance with laws, and that is conducted by an owner or operator of a Facility or is an activity by an employee of the owner or operator or by an independent contractor.

4.5 Environmental Waste - All environmental pollutants, wastes, discharges, and emissions, regardless of whether or how they are regulated, and regardless of whether they are released to the general environment or the workplace environment.

4.6 Gravity-Based Civil Penalty - The punitive portion of a civil penalty calculated by determining the extent of deviation from Indiana's Environmental Requirements and the potential for harm to human health and the environment.

4.7 Indiana Environmental Requirements - Includes, but is not limited to, any (1) requirement prescribed by Title 13 of the Indiana Code; (2) rule adopted by the Air Pollution Control Board, Solid Waste Management Board, Water Pollution Control Board, and/or the Financial Assurance Board; (3) term or condition within a permit, license, registration or certification; or (4) requirement contained within a judicial order or final administrative order.

4.8 Offset - Credit toward of the proposed Gravity-Based Civil Penalty in consideration of the performance of an IDEM-approved SEP pursuant to the terms of the Agreed Order.

4.9 Pollution Prevention (P2) - The use by a business or commercial operation in Indiana of a practice that reduces the industrial use of toxic materials, or reduces the environmental and health hazards associated with an environmental waste without diluting or concentrating the waste before the release, handling, storage, transport, treatment or disposal of the waste.

4.10 Regulated Entity - Any entity subject to one or more IDEM administered statutes and rules.

4.11 Respondent - A Regulated Entity that enters into an Agreed Order with IDEM.

4.12 Supplemental Environmental Project (SEP) - An environmentally beneficial project that improves, protects, or reduces risks to public health or the environment, which a Regulated Entity agrees to undertake in further settlement of an enforcement action, but which the Regulated Entity is not otherwise legally required to perform. A SEP is an optional addition to an Agreed Order, and may offset part or all of the civil penalty in the Agreed Order.

4.13 SEP Committee - A committee composed of one case manager from each section in OE. The SEP committee analyzes and reviews SEP proposals.

4.14 Small Regulated Entity - either (1) a Regulated Entity employing 100 or fewer individuals across all facilities and operations owned by that Regulated Entity; (2) a town as defined by Ind. Code § 36-1-2-21; (3) township as defined by Ind. Code § 36-1-2-22; or (4) a municipal corporation as defined by Ind. Code § 36-1-2-10.

4.15 Violation - means (1) any Violation or alleged Violation of Indiana's Environmental Requirements identified in a judicial order or final administrative order, consent agreement or order, variance, field citation, complaint, warning letter, violation letter, or notice of violation; (2) noncompliance with a requirement of statute, rule, order, license, permit, or any part thereof under the jurisdiction of IDEM and includes both acts and omissions; and/or (3) any act or omission for which the Regulated Entity has previously received penalty mitigation from IDEM, EPA, or

5.0 ROLES

Title	# of Staff	Experience, Qualifications, and Training	Location
Commissioner	1	Familiarity with all agency policies and makes ultimate decision as to application of the policy to a specific project.	Commissioner's Office
Assistant Commissioner	1	Familiarity with Supplemental Environmental Project Policy. Makes recommendation to the Commissioner regarding the applicability of Policy to a proposed project.	Commissioner's Office
Branch Chief	1	Familiarity with Supplemental Environmental Project Policy. Makes recommendation concerning acceptance of project proposal.	Office of Enforcement
Section Chief	4	Familiarity with Supplemental Environmental Project Policy and other IDEM non-rule policies. Makes recommendations as to applicability of policy to proposed project.	Office of Enforcement
Case Manager	> 30	Familiarity with Supplemental Environmental Project Policy and other IDEM non-rule policies. Manages evaluative process.	Office of Enforcement

6.0 POLICY

It is the policy of IDEM to encourage the consideration, development, and implementation of SEPs to further the State's goals of protecting and enhancing human health and the environment. In exchange for agreement to perform a SEP, IDEM shall mitigate a portion of Respondent's proposed Gravity-Based Civil Penalty.

It is solely IDEM's discretion whether a SEP will be accepted. In exercising its discretion, IDEM may take action that varies from the policies or procedures contained in this document if such action is appropriate to a specific case.

6.1 Criteria Used to Determine Appropriate SEPs

Any Respondent against whom IDEM has taken an enforcement action that assesses a civil penalty may propose to undertake a SEP. Respondent seeking SEP approval shall submit a complete SEP proposal as early in the enforcement process as possible.

When reviewing the SEP proposal, IDEM shall assess the SEP proposal in light of certain criteria: (1) whether the project was submitted as early in the enforcement process as possible; (2) whether the project meets State, regional and/or community environmental priorities; (3) whether the project directly or indirectly benefits the environment and/or human health above and beyond Indiana's Environmental Requirements; (4) whether Respondent will be performing the SEP itself, or if the SEP will be performed by a third party, whether the third party will be governed by an enforceable agreement with Respondent proposing the SEP; (5) whether Respondent proposed, initiated, or funded the project prior to the violation which gave rise to the enforcement action; and (6) whether Respondent has a history of non-compliance with Indiana's Environmental Requirements.

Whether IDEM decides to accept a SEP as part of a settlement is purely within its enforcement discretion. Even if a SEP appears to satisfy all of the provisions of this Policy, IDEM may reject a SEP because (1) the cost of reviewing the SEP is excessive; (2) the SEP is not enforceable; (3) Respondent has a history of non-compliance; (4) Respondent does not appear to have the financial or technical resources to implement the SEP; (5) Respondent, rather than the public, is likely to receive the most substantial benefit; (6) the SEP proposal was not timely received; (7) the SEP was proposed, initiated or funded by Respondent prior to the identification of the violations; or (8) the Civil Penalty being offset is so small that no significant gain is realized when compared to the cost and time in administering the SEP.

Projects not appropriate for SEPs include, but are not limited to (1) projects that were started, or for which the funding source was identified, before the violation was identified by IDEM; (2) projects that would be likely to cause additional damage to the environment or public health if done poorly or if left incomplete; (3) projects

required by any Federal, State, or local law or regulation; (4) projects that represent capital expenditures or management improvements for which IDEM may reasonably conclude that the regulated entity, rather than the public, is likely to receive the substantial share of the benefits which accrue from it; or (5) site assessments for properties where there is a viable responsible party.

6.2 Categories of Supplemental Environmental Projects

The following eight (8) categories of projects are considered acceptable SEPs, provided that they meet all the additional criteria described in this Policy.

6.2.1 Pollution Prevention

Pollution Prevention characterizes any practice which reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment prior to recycling, treatment, or disposal; reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants; or reduces or eliminates the creation of pollutants through increased efficiency in the use of raw materials, energy, water or protection of natural resources by conservation.

The following are the six (6) basic approaches to pollution prevention eligible for SEP credit:

- a. Modification of equipment or technology.
- b. Modification of processes or procedures.
- c. Reformulation or redesign of products.
- d. Substitution of raw materials.
- e. Conservation of energy and natural resources.
- f. Implementation of Environmental Management Systems (e.g., ISO 14001).

6.2.2 Pollution Reduction/Pollution Control

A pollution reduction/pollution control project reduces pollution at a Respondent's facility substantially beyond Indiana's Environmental Requirements. Pollution control projects reduce pollutant levels or odors by advanced control technologies or materials reuse and reclamation, but not by dilution of concentration. Pollution control projects do not include reducing pollution by transferring it from one media to another unless beneficial reuse, improved destruction, or some other significant environmental benefit results. Pollution reduction programs that entail outsourcing industrial processes which contribute to pollution at other facilities will not qualify as SEPs.

A pollution reduction project that is required by Indiana's Environmental Requirements but proposes an accelerated compliance schedule may qualify as a SEP. If a Respondent proposes to complete a phase out or reduction at least twenty-four (24) months ahead of time, and such a proposal for accelerated compliance can be demonstrated to result in a significant pollution reduction, then the proposal may qualify for SEP credit. In addition, if Respondent substitutes another substance for the one being phased out, Respondent has the burden to prove the new substance is non-polluting or represents a significant pollution reduction over the phased out pollutant.

6.2.3 Environmental Conservation, Protection and Restoration

An environmental conservation, protection and restoration project is one which conserves, protects, and enhances the overall condition of an ecosystem or geographic area. These projects may be used to restore or protect natural or built environments or to protect natural resources through conservation or increased efficiency in the use of energy, water, or other materials. This project must go beyond the remedial work required to restore or mitigate the existing environmental damage to the environment caused by Respondent.

Examples of such projects include, but are not limited to, the remediation of a brownfield, restoration of a wetland, the purchase and management of a watershed area to protect a drinking water supply or endangered species, the restoration of an indigenous natural area such as a tallgrass prairie, or the contribution of moneys to a IRC § 501(c)(3) environmental or natural resource not-for-profit organization.

6.2.4 Environmental Audits

To qualify as a SEP, an Environmental Audit must be multi-media, and must be conducted at all facilities in the State of Indiana which are owned by Respondent. The proposal must also include a commitment from Respondent to follow-up and correct all violations and problems found in the Environmental Audit. A copy of the Environmental Audit shall be submitted to IDEM and treated as confidential information pursuant to Ind. Code § 13-28-4.

6.2.5 Comprehensive Environmental Training

Environmental training projects provide essential information to a Respondent's employees concerning the employee's and Respondent's environmental responsibilities. These projects must provide significant, ongoing, comprehensive environmental management training. To qualify as a SEP, the training must have the following characteristics:

- a. Go beyond the training requirements found in environmental regulations such as the hazardous waste rules, the water and wastewater treatment operator certification rules, air pollution rules, and permit requirements.
- b. Include all employees with environmental responsibilities.
- c. Be conducted as a part of an ongoing offering that includes at least one day per year of training for key environmental personnel and all production management staff.
- d. Address all environmental media in an integrated manner.
- e. Identify the potential environmental and legal implications of Respondent's actions or inactions.
- f. Describe the Indiana Environmental Requirements of Respondent including a detailed review of Respondent's permit requirements.
- g. Provide an assessment, such as an examination, of the effectiveness of each training offering and the program as a whole.

Only costs associated with the presentation of the training such as trainer's fees, course materials and reasonable rental charges may be credited.

6.2.6 Community Involvement

Community involvement SEPs support community environmental projects or outreach, or promote emergency planning and preparedness. SEPs in this category should be developed taking into consideration input received from the affected community.

6.2.7 Public Awareness

Public awareness projects are defined as publications, broadcasts, or seminars which underscore for the regulated community the importance of complying with Indiana's Environmental Requirements, or which disseminate technical information about the means of complying with Indiana's Environmental Requirements. Permissible public awareness projects may include sponsoring industry-wide seminars directly related to correcting widespread or prevalent violations within a sector. Respondents who fund or implement a public awareness project must also agree to publicly state in a prominent manner that the SEP was undertaken as part of settlement of an enforcement action brought by IDEM. These projects will be closely scrutinized to ensure that they fulfill the legitimate objectives of this Policy in all respects.

6.2.8 Public Health

A public health project provides diagnostic, preventive and/or a remedial component to human health care which is related to the actual or potential damage to human health caused by the Violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment, and rehabilitation therapy.

Public health SEPs are acceptable only where the primary benefit of the project is the population that was harmed or put at risk by the Violations. SEPs that mitigate damage or reduce risk to minority or low-income populations that have been disproportionately exposed to pollution, or are at environmental risk, perform well in this factor.

6.3 Extent by Which the Assessed Civil Penalty May Be Reduced by a SEP

Although SEPs may directly fulfill IDEM's mission statement, there is an important countervailing enforcement goal that penalties should achieve a sufficient deterrent effect upon Regulated Entities. Note that the final Civil Penalty (without considering the amount approved for any SEPs) must be sufficient to have a deterrent

effect on the individual Respondent and on other Respondents in similar positions, and to the extent possible, recapture the Economic Benefit of Noncompliance plus some appreciable portion of the gravity component of the penalty computation.

OE undertakes two (2) steps in determining the extent to which a SEP can offset a Civil Penalty: (1) calculating the minimum portion of the Civil Penalty assessment that must be collected as a cash payment; and (2) determining the amount of credit each dollar spent on the SEP will receive in reduction of the Civil Penalty.

As to the first step, the minimum cash component of the penalty must equal or exceed one of the following: (1) 100% of the economic benefit plus 20% of the gravity component; or (2) 25% of the gravity component where there is no economic benefit.

Generally, SEP proposals approved by IDEM shall be subject to the following minimum requirements: (1) the offset ratio shall not be better than 2:1; and (2) the amount of the Gravity-Based Civil Penalty to be offset shall not exceed 80%. For example, in the best-case scenario, a proposed Gravity-Based Civil Penalty of \$100,000 would result in (1) a cash payment to IDEM of \$20,000; and (2) a Gravity-Based Civil Penalty offset requiring the expenditure of no less than \$160,000 on the approved SEP (i.e., $\$100,000 - \$20,000 = \$80,000 \times 2 = \$160,000$). These general guidelines are subject to the following exceptions:

6.3.1 Pollution Prevention SEP Proposals

Pollution Prevention SEP proposals approved by IDEM may be afforded an offset ratio of 1:1. Additionally, a Respondent receiving approval of its Pollution Prevention SEP may be afforded the opportunity to offset 100% of the Gravity-Based Penalty.

6.3.2 Environmental Conservation, Protection & Restoration Proposals

SEP proposals to donate funds to a IRC § 501(c)(3) environmental or natural resource not-for-profit organization may be afforded an offset ratio of 1:1.

6.3.3 Governmental Entities, Small Businesses, or Not-for-Profits SEP Proposals

SEP proposals submitted by Governmental Entities, Small Businesses, or Not-for Profits to IDEM for approval may be afforded an offset ratio of 1:1.

6.3.4 First Time Respondent(s) SEP Proposals

A Respondent that is issued its first Notice of Violation may be afforded an offset ratio of 1:1.

6.3.5 Small Gravity-Based Civil Penalty SEP Proposals

A Respondent assessed a proposed Gravity-Based Civil Penalty of equal to or less than \$10,000 may be afforded an offset ratio of 1:1.

6.3.6 Violations of Non-Federally-Delegated Programs

A Respondent solely violating one or more of Indiana's Environmental Requirements not based upon a federally-delegated program (i.e., waste tire program) may be afforded an offset ratio of 1:1.

6.3.7 Other

Any person that is the subject of an enforcement matter is eligible to request a \$1.00 reduction in penalty for every \$1.00 spent on a SEP that specifically goes beyond any legal requirement and results in direct reductions of pollutants entering the environment or actual remediation of contaminated sites.

6.4 Information to Include in a SEP Proposal

In submitting a SEP proposal for consideration by IDEM, Respondent must submit the proposal as early in the enforcement process as possible. The Guideline for Proposal can be requested in writing at Indiana Department of Environmental Management, Office of Enforcement, 100 North Senate Avenue, Indianapolis,

Indiana 46204 or is available on the IDEM website:
<http://www.in.gov/idem/rules/policies/enforcement/0003.pdf>

7.0 REFERENCES

Authority: [IC 13-30-4](#); [IC 13-14-1-11.5](#)

Citations: [IC 13-11-2-166](#); 42 U.S.C. § 13101

8.0 SIGNATURES

Thomas W. Easterly, Commissioner,
Indiana Department of Environmental Management

Date

Robert Keene, Assistant Commissioner,
Office of Legal Counsel and Enforcement
Indiana Department of Environmental Management

Date

This policy is consistent with Agency requirements.

Indiana Department of Environmental Management
Quality Assurance Program
Planning and Assessment

Date

Posted: 07/09/2008 by Legislative Services Agency
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